71-721

In The

Supreme Court of the United States

OCTOBER TERM, 1971

Docket No. 34984

EDWARD JERNEK,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

H. ELLIOT WALES
Attorney for Petitioner
299 Broadway
New York, New York 10007

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Edward Jernek petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered June 17, 1971 (Docket No. 34984).

The judgment affirmed the conviction, for interstate gambling (18 U.S.C. 1084 and 1952), after a jury trial in the Southern District of New York (No. 66 CR 967).

Opinions Below

The opinion of the Court of Appeals, not yet reported, is set forth as Appendix A.

The opinion of the District Court, not yet reported, is set forth as Appendix B.

Jurisdiction

The jurisdiction of this Court to review the judgment of the Court of Appeals is granted pursuant to 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions Involved

The Fourth Amendment to the United States Constitution, prohibiting illegal search and seizures, and the Fifth Amendment, as to the privilege against self-incrimination, are well known to this Court.

26 U.S.C. 4411 and 4412, requiring the payment of the wagering excise tax and the filing of a tax registration, have become non-enforceable as a result of Marchetti (390 U.S. 39) and Grosso (390 U.S. 62).

18 U.S.C. 1084 prohibits the use of a telephone in interstate commerce to place wagers; 18 U.S.C. 1952 prohibits the use of an interstate facility to promote an unlawful activity of gambling, in violation of state law.

Issues Involved

Did the Court of Appeals err, contrary to the holding of United States v. United States Coin and Currency, 401 U.S. ___, 91 S. Ct. 1041, 28 L. Ed. 2d 434 (1971), in not applying Marchetti, 390 U.S. 39, and Grosso, 390 U.S. 62, retroactively, to invalidate a search warrant issued and executed in 1966?

Did the Court of Appeals err in not applying United States Coin and Currency and Marchetti-Grosso to a 1970 pretrial suppression application to invalidate a 1966 search warrant issued on the strength of the federal gambling excise tax?

Did the Court of Appeals err in not applying United States Coin and Currency and Marchetti-Grosso to a pretrial suppression application in a criminal proceeding charging violations of the federal interstate gambling statutes (18 U.S.C. 1084, 1952)?

Preliminary Statement

Petitioner was convicted in 1970 for use of a telephone to promote interstate gambling. Much of the evidence — such as betting slips and other paraphernalia, plus the telephone instruments — were seized as a result of a search conducted by federal tax agents, on June 1, 1966. The agents were armed with search warrants charging violations of the wagering tax statutes (26 U.S.C. 4411 and 4412).

The trial was held in January, 1970. Prior to trial, the defense moved to suppress the evidence so seized, on the strength of Marchetti and Grosso. In a written opinion the District Court denied the application (Appendix B).

In affirming the conviction, the Court of Appeals wrote:

> These appellants on brief told us that they are appealing "solely" from the pretrial denial of a motion to suppress. Judge Lasker's opinion, United States v. Armiento

and Jernek, ___ F. Supp. ___ (S.D.N.Y. Jan. 6, 1970), recited that the detailed affidavits predicating the search warrants, valid when issued June 1, 1966, adequately established probable cause. They reflected personal observations of special agents of the Intelligence Division of the Treasury Department, transactions carried out between the agents and the defendants, and telephone calls personally placed by the agents. Judge Lasker explained that "an element of one of the crimes which was the subject of the investigation" was an apparent failure to register [26 U.S.C. §4412], concluding "In addition, it should be noted that the affidavits are not restricted to violations of the wagering tax statutes."

The appellants contended that the search warrants should have been retroactively invalidated pursuant to the Court's rulings in Marchetti v. United States, 390 U.S. 39 (1968) and Grosso v. United States, 390 U.S. 62 (1968). Judge Lasker rejected that contention, and so do we.[1]

Let it be noted at once that, with the consent of the Government, the district court, taking account of the Marchetti-Grosso rulings, dismissed the third count which had charged the appellants with failing to pay the special tax imposed by 26 U.S.C. §4411, and the fourth count which had charged a failure to supply the information required by 26 U.S.C. §4412. Their Fifth Amendment privilege against compulsory self-incrimination was thus recognized[2] as a valid defense to their prosecution on these counts.

After the dismissal of the third and fourth

counts, the appellants stood charged in the first count, with the use of a wire communication facility for the interstate transmission of bets in violation of 18 U.S.C. §1084; and in the second count with violation of 18 U.S.C. §1952, the use of a facility in interstate commerce to carry on a gambling enterprise in violation of New York State law.[3] These statutes had been passed in aid of the Government's anti-racketeering program, and were in no way related[4] to an improper exercise of the Government's power "to assess and collect taxes on unlawful gambling activities." United States v. United States Coin & Currency, supra, note 1, 401 U.S. at ___. Thus these appellants have not been convicted of failure to register and to pay the tax. Rather, they were convicted[5] because of the evidence adduced through and the testimony of the special agents of the Treasury after a trial running through some five court days.

In contrast, and quite obviously to be distinguished from the circumstances in the instant case, we note that initially one Angelini had already been convicted of failure to register or to pay the wagering tax in violation of 26 U.S.C. §§4411 and 4412, United States v. Angelini, 346 F.2d 278 (7 Cir.), cert. denied 382 U.S. 838 (1965). With that much in mind, we take account also of the additional background[6] predicating United States v. United States Coin & Currency.[7] There Mr. Justice Harlan emphasized that the Court in Marchetti-Grosso "took pains" to make clear that "It was only

the method Congress had adopted in collecting the tax that raised the Fifth Amendment question" and "only this method of tax collection . . . was subject to constitutional objection."[8] (Emphasis added.) In that case it was held that the wagering funds of the gambler Angelini were not to be forfeited on account of his earlier failure to comply with Sections 4411 and 4412 for "the conduct being penalized is constitutionally immune from punishment."[9] (Emphasis added.)

* * * *

The Supreme Court denied certiorari in Washington, 401 U.S. ___, 39 L.W. 3509, where the May 17, 1971 Journal reports the dissenting views of Justices Douglas, Black and Brennan. Ordinarily, to be sure, the mere denial of certiorari may lack significance. But where in dissent it is so sharply urged that United States v. Coin & Currency should have controlled the disposition of the petition, the majority's rejection of that argument surely is entitled to important weight.

The Court itself supplied that weight in its May 4, 1971 order granting the Government's petition for certiorari in United States v. Lizzo, 401 U.S. ___, 39 L.W. 3478, 3485. The Court vacated the Seventh Circuit's Lizzo judgment[13] and remanded "for reconsideration in light of this Court's decision in Mackey v. United States," supra,[14] note 1. (Emphasis added.)

We are satisfied that Judge Lasker cor-

> rectly perceived that these appellants had been charged with violations of unchallenged federal statutes totally unrelated to the wagering tax provisions under consideration in Marchetti-Grosso.[15] Thus the evidence seized by the agents under the circumstances described was not subject to exclusion. Accordingly we find no error in his denial of the pretrial motion to suppress, and the convictions are — Affirmed.

Reasons for Granting the Writ

In United States v. Coin and Currency, 401 U.S. , 91 S. Ct. 1041, 28 L.Ed. 2d 434 (1971), this Court applied Marchetti and Grosso retroactively so as to set aside the judicial forfeiture of the items seized for noncompliance with the registration and gamblers tax requirements.

It is now in order for this Court to rule whether Marchetti and Grosso may be applied retroactively to set aside a search warrant issued and executed in 1966 and to suppress the seized evidence which was used in a 1970 trial. It should be noted that the issue was fully raised, briefed, and decided in the District Court prior to trial.

The affidavit in support of the search warrant, set forth in its entirety in footnote 1 of the District Court opinion, recites a violation solely of 26 U.S.C. 4401, 4411, and 7262 — the Internal Revenue Code. See Appendix B, footnote 1.

When the issue was raised in United States v. Washington, 401 U.S. ___, 91 S. Ct. 1641, 39 L.W.

3509 (5/17/71), three members of this Court dissented from the denial of certiorari. Mr. Justice Douglas, joined by Mr. Justice Black wrote:

> The central question is whether the evidence obtained by a warrant in the criminal case, which retrospectively contained the constitutional infirmity noted in Grosso, may be used in this civil case.
>
> Since, as we held in United States v. United States Coin and Currency, 401 U.S. ___, 91 S. Ct. 1041, 28 L. Ed.2d 434, our decision in Grosso (and its companion Marchetti v. United States, 390 U.S. 39, 88 S. Ct. 697, 19 L.Ed. 2d 889), are retroactive, I do not see how evidence obtained by use of a search warrant issued under the old regime which Grosso and Marchetti put into the discard, can do service for process in this new and wholly different civil proceeding.

Mr. Justice Brennan stated:

> Under these cases, therefore, there is substantial doubt whether the Government could constitutionally punish petitioner for his failure to register.[1] By the same token, I think there is a substantial question whether the affidavits supporting the search warrant were sufficient to establish probable cause to believe that petitioner had committed an offense which the Government could constitutionally prohibit.

The record in our case is more appropriate

for the resolution of this issue than in Washington. In our case the issue was fully raised, briefed, and decided prior to trial. Washington was tried in 1966 — prior to Marchetti-Grosso. At the trial the defense conceded that the search warrant had been properly issued (402 F.2d at 4). The defense did not question the validity of the search warrant or object to the admissibility of the evidence so seized (402 F.2d at 6). The issue was first posed on appeal (402 F.2d at 4). This distinction is crucial to at least one member of this Court — see dissent of Mr. Justice Harlan in United States v. Desist, 394 U.S. 244, 256-257 (1968), and repeated again in United States v. Williams, 401 U.S. ___, 91 S. Ct. 1172, 1175, 1181 (1971).

Washington involved an in rem proceeding to foreclose a lien to collect taxes. It did not involve a criminal prosecution for violation of the gambling statutes. This distinction is crucial to at least one member of this Court, for in his concurring opinion in United States v. Mackey, 401 U.S. ___, 91 S. Ct. 1160, 1169, 28 L. Ed. 2d 404 (1971), Mr. Justice Marshall (joined by Mr. Justice Brennan) wrote:

> This case presents the question what, if any, use the Government is entitled to make of wagering excise tax returns, filed pursuant to the statutory scheme, in a prosecution for income tax evasion. Since I believe the Fifth Amendment does not prevent the use of such returns to show a likely source of unreported income in a criminal prosecution for income tax evasion. I concur in

the judgment of the Court.

> . . . this case does not involve a prosecution for gambling or related activities. It involves a prosecution for income tax evasion. . . . But here the Government was entitled to demand the information that petitioner supplied — his gross income from wagering — in order to enforce the tax laws. Petitioner was entitled to claim the privilege only because of the possibility of prosecution under state or federal gambling laws. No such prosecution is involved here. (Emphasis supplied.)

Conclusion

It is requested that the petition be granted.

Respectfully submitted,

s/ H. Elliot Wales
Counsel for Petitioner Jemck
299 Broadway
New York, N.Y. 10007

July 19, 1971

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 231 September Term, 1970.

(Argued September 30, 1970 Decided June 17, 1971.)

Docket No. 34984

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES ARMIENTO and EDWARD JERNEK,

Defendants-Appellants.

Before:

FRIENDLY, *Chief Judge,*
DANAHER* and HAYS, *Circuit Judges.*

Appeals from a judgment of the District Court for the Southern District of New York, Morris E. Lasker, *Judge,* convicting appellants, after a verdict, on two counts of an indictment which charged them with using the telephone to transmit bets and wagers in interstate commerce in violation of 18 U.S.C. §1084 and to carry on a bookmaking business prohibited by the laws of New York State in violation of 18 U.S.C. §1952, on the ground that a motion to suppress was erroneously denied. Affirmed.

* Senior Circuit Judge of the District of Columbia Circuit, sitting by designation.

Appendix A

JOHN W. NIELDS, JR., Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and William B. Gray, Assistant United States Attorney, of Counsel), *for Appellee.*

H. ELLIOT WALES, Esq., New York, New York, *for Defendants Appellants.*

DANAHER, *Circuit Judge*:

These appellants on brief told us that they are appealing "solely" from the pre-trial denial of a motion to suppress. Judge Lasker's opinion, *United States* v. *Armiento and Jerneck*, ——— F. Supp. ——— (S.D.N.Y. Jan. 6, 1970), recited that the detailed affidavits predicating the search warrants, valid when issued June 1, 1966, adequately established probable cause. They reflected personal observations of special agents of the Intelligence Division of the Treasury Department, transactions carried out between the agents and the defendants, and telephone calls personally placed by the agents. Judge Lasker explained that "an element of one of the crimes which was the subject of the investigation" was an apparent failure to register [26 U.S.C. §4412], concluding "In addition, it should be noted that the affidavits are not restricted to violations of the wagering tax statutes."

The appellants contended that the search warrants should have been retroactively invalidated pursuant to the Court's rulings in *Marchetti* v. *United States*, 390 U.S. 39 (1968) and *Grosso* v. *United States*, 390 U.S. 62 (1968). Judge Lasker rejected that contention, and so do we.[1]

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1 Following argument on September 30, 1970, we deferred decision to await possible guidance from the Supreme Court's impending decisions

Appendix A

Let it be noted at once that, with the consent of the Government, the district court, taking account of the *Marchetti-Grosso* rulings, dismissed the third count which had charged the appellants with failing to pay the special tax imposed by 26 U.S.C. §4411, and the fourth count which had charged a failure to supply the information required by 26 U.S.C. §4412. Their Fifth Amendment privilege against compulsory self-incrimination was thus recognized[2] as a valid defense to their *prosecution* on these counts.

I.

After the dismissal of the third and fourth counts, the appellants stood charged in the first count, with the use of a wire communication facility for the interstate transmission of bets in violation of 18 U.S.C. §1084; and in the second count with violation of 18 U.S.C. §1952, the use of a facility in interstate commerce to carry on a

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in *United States* v. *United States Coin & Currency*, 401 U.S. —— (39 U.S.L.W. 4415) and *Mackey* v. *United States*, 401 U.S. —— (39 U.S. L.W. 4372). Upon release of the Court's opinions in those cases, April 5, 1971, we called for supplemental briefs that respective counsel might take account of the impact of those opinions on the issue pending here.

2 Accordingly, Judge Lasker denied the appellants' motion to suppress, ruling that they thereupon stood charged only "with using interstate facilities to violate New York and Federal anti-gambling and racketeering statutes."

Retroactivity was thus accorded to the extent here pertinent. See this court's disposition under not dissimilar circumstances in *United States* v. *Kelley*, 395 F.2d 727, 729 (1968). It is obvious enough that problems in the area of retroactive application of newly-announced constitutional rulings have not found automatic resolution. See, *e.g.*, inter alia, *Mackey* v. *United States*, *supra*, note 1, *United States* v. *United States Coin & Currency*, *supra*, note 1, and compare discussions in *Williams and Elkanich* v. *United States*, 401 U.S. —— (April 5, 1971) and *California* v. *Byers*, 401 U.S. —— (May 17, 1971).

gambling enterprise in violation of New York State law. These statutes had been passed in aid of the Government's anti-racketeering program, and were in no way related to an improper exercise[3] of the Government's power "to assess and collect taxes on unlawful gambling activities." *United States* v. *United States Coin & Currency, supra,* note 1, 401 U.S. at ——. Thus these appellants have not been convicted of failure to register and to pay the tax. Rather, they were convicted because of the evidence adduced through and the testimony of the special agents of the Treasury after a trial running through some five court days.

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3 These statutes have nothing to do with and are not part of a "system" of tax collection such as engaged the notice of the Court in *Marchetti* v. *United States, supra,* and *Grosso* v. *United States, supra.* See *Mackey* v. *United States,* 401 U.S. —— (April 5, 1971). The conviction of these appellants did not depend upon compelled statements within the meaning of the Fifth Amendment.

4 See *Mackey* v. *United States, supra,* note 1; and cases hereinafter discussed in our text.

Cf. *United States* v. *Knox,* 396 U.S. 77, 80, 82 (1969); *Postell* v. *United States,* 429 F.2d 528, 529 (6th Cir. 1970); *Mengarelli* v. *United States,* 426 F.2d 985, 986 (9th Cir. 1970).

5 They neither testified nor called witnesses. They freely conceded on brief that they were bookmakers in Manhattan accepting bets on horse races and baseball games. They operated out of two premises, including Apartment 6C, 119 East 36th Street, with a telephone in each, so set up that if the phone rang in one apartment, it would ring in the other as well. Bettors were given the telephone number of an answering service where, upon asking for "Mr. Peters" they would leave their names and phone numbers. "Mr. Peters" would return their calls, and they would place their bets.

An Internal Revenue Service Agent on several occasions placed wagers directly with Armiento and was given a certain number to call in the future when betting. Bettors settled their accounts with Jernek personally. One bettor from New Jersey telephoned on some occasions to "Mr. Peters," subsequently receiving a return call from him and placing his bet each time.

Compare the appellants' own version of the facts, thus paraphrased, with the gamblers' method of operation as described in *United States* v. *Kelley, supra,* note 2, 395 F.2d at 729.

II.

In contrast, and quite obviously to be distinguished from the circumstances in the instant case, we note that initially one Angelini had already been convicted of failure to register or to pay the wagering tax in violation of 26 U.S.C. §§4411 and 4412, *United States* v. *Angelini*, 346 F.2d 278 (7 Cir.), *cert. denied* 382 U.S. 838 (1965). With that much in mind, we take account also of the additional background[6] predicating *United States* v. *United States Coin & Currency*.[7] There Mr. Justice Harlan emphasized that the Court in *Marchetti-Grosso* "took pains" to make clear that "It was only the method Congress had adopted in collecting the tax that raised the Fifth Amendment question"—and "*only this method* of tax collection . . . was subject to constitutional objection."[8] (Emphasis added.) In that case it was held that the wagering funds of the gambler Angelini were not to be forfeited on account of his earlier failure to comply with Sections 4411 and 4412 for "the *conduct* being *penalized* is constitutionally immune from *punishment*."[9] (Emphasis added.)

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6 The Government next filed its libel against Angelini's gambling funds and secured an order of forfeiture which the Seventh Circuit affirmed, 379 F.2d 946 (1967), but *certiorari* was granted, 390 U.S. 204 (1968) and the case was remanded. Then upon re-consideration the Seventh Circuit noted, 393 F.2d 499, 500 (1968) that the only apparent purpose of the forfeiture statute was to *punish* "violations of Sections 4411 and 4412 of the Internal Revenue Code by taking away money used in committing the violations."

7 *Supra*, note 1.

8 *United States* v. *United States Coin & Currency*, *supra*, note 1, 401 U.S. at ——.

9 *Id.*, 401 U.S. at ——.

Appendix A

III.

The Eighth Circuit sat *en banc* to consider whether or not search warrants usable[10] when issued in connection with violations of 26 U.S.C. §§4411 and 4412, became unusable after the *Marchetti-Grosso* rulings came down. There as here, charges of violation of the gambling tax statutes were dismissed. Chief Judge Van Oosterhout commented, *United States* v. *Hanon*:[11]

> In our present case, defendants are not being punished criminally or otherwise for failure to comply with the wagering tax laws. They are being punished for violating §1952, proscribing interstate gambling. The failure to register or pay the tax is not an element of the §1952 charge. Defendants have not complied with the registration or tax laws and no evidence has been offered or received in their trial before the jury with respect to violation of the wagering tax laws. The only way the wagering tax is here involved is that it offers probable cause under the Fourth Amendment for the search. Probable cause for the search is a Fourth Amendment issue and such issue has heretofore been discussed and decided adversely to the defendants.

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10. To the extent that a Fourth Amendment question could be said to have been presented in the instant case, we may deem it resolved on the basis of *United States* v. *Hanon*, 428 F.2d 101, 104 (8 Cir. *in banc* 1970), *cert. denied* 401 U.S. ——— (May 4, 1971, 39 L.W. 3480), with Mr. Justice Douglas *alone* noting that he would have granted certiorari, and with Mr. Justice Blackmun taking no part, having participated as one of the majority in the Eighth Circuit *in banc* consideration of *Hanon*. Compare *United States* v. *Bennett*, 415 F.2d 1113, 1114, 1115, 2 Cir., *cert. denied* 396 U.S. 852 (1969).

As to *Marchetti* v. *United States*, *supra*, note 1.

11. *United States* v. *Hanon*, *supra*, note 10, 428 F.2d at 106.

Appendix A

In *United States* v. *Tiktin*, 427 F.2d 1027 (6 Cir. 1970), the Government had appealed from a district court order granting the appellees' motion to suppress. Reversing, and following the reasoning of the Fourth Circuit in *Washington* v. *United States*, 402 F.2d 3, 6 (1968), Judge Edwards concluded that evidence seized pursuant to a search warrant issued upon the basis of an alleged violation of the federal wagering tax laws was not to be suppressed in a prosecution under the Anti-Racketeering Act.[12] The Supreme Court denied certiorari May 4, 1971, 401 U.S. ——, 39 L.W. 3480.

Turning again to *Washington* v. *United States, supra*, Judge Boreman wrote, 402 F.2d at 6:

> ". . . The carefully circumscribed [*Marchetti-Grosso*] holding is that a defendant may not be *convicted* of a criminal violation of the wagering tax laws *if* he has properly claimed his constitutional privilege against self-incrimination." (Emphasis in original.)

Thus he concluded a valid search warrant may issue even though the Government may be unable to *convict* a defendant who properly raises his claim of privilege against self-incrimination.

The Supreme Court denied certiorari in *Washington*, 401 U.S. ——, 39 L.W. 3509, where the May 17, 1971 Journal reports the dissenting views of Justices Douglas, Black and Brennan. Ordinarily, to be sure, the mere denial of

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12 Compare *DiPiazza* v. *United States*, 415 F.2d 99, 107 (6 Cir. 1969), citing *Washington* v. *United States, supra*, where Judge Phillips declined to exclude evidence seized pursuant to warrants which were proper authority for the searches at the time they were issued and executed. So "when the evidence is introduced to show the commission of crimes other than wagering tax violations," it was properly received.

The Supreme Court denied certiorari on May 4, 1971, 401 U.S. ——

certiorari may lack significance. But where in dissent it is so sharply urged that *United States* v. *Coin & Currency* should have controlled the disposition of the petition, the majority's *rejection* of that argument surely is entitled to important weight.

The Court itself supplied that weight in its May 4, 1971 order granting the Government's petition for certiorari in *United States* v. *Zizzo*, 401 U.S. ——, 39 L.W. 3478, 3485. The Court vacated the Seventh Circuit's *Zizzo* "judgment" and remanded "for reconsideration in light of this Court's decision in *Marchetti* v. *United States*," *supra*," note 1. (Emphasis added.)

We are satisfied that Judge Lasker correctly perceived that these appellants had been charged with violations of unchallenged federal statutes totally unrelated to the wagering tax provisions under consideration in *Marchetti* [illegible]. Thus the evidence seized by the agents under the

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13 The Seventh Circuit's opinion in *Zizzo* v. *United States*, 431 F.2d 913 (1970), discloses that Section 2255 relief had been sought by Zizzo following his earlier conviction, affirmed in 338 F.2d 577 (7 Cir. 1964). He then had been charged with violating 18 U.S.C. §1952, and at trial, wagering tax forms had been received in evidence against him. After *Marchetti-Grosso*, *Zizzo* sought retroactive relief which was granted by the court over the opposition of the Government, then relying upon the Seventh Circuit's own opinion in *Mackey* v. *United States*, 411 F.2d 504 (1969).

Judge Campbell, noting the pendency before the Court of *United States* v. *United States Coin & Currency* and *Mackey* v. *United States*, nevertheless undertook to distinguish *Mackey*, *supra*, as not controlling *Zizzo*, 431 F.2d at 916.

Obviously the Supreme Court ruled otherwise, and the "system of federal and state prohibitions" discussed in *Marchetti* v. *United States*, *supra*, is not at all as "comprehensive" as the Seventh Circuit had taken it to be.

14 Concurring in the judgment in *California* v. *Byers*, *supra*, note 2, Mr. Justice Harlan observed that the *Marchetti-Grosso* "line of cases should be explicitly limited by this Court," 401 U.S. at ——.

15 These cases "neither said nor in our view implied that professional gamblers should be protected against the discovery of their otherwise

circumstances described was not subject to exclusion. Accordingly we find no error in his denial of the pre-trial motion to suppress, and the convictions are

Affirmed.

unlawful acts by procedures which would not compel them to aid in their own incrimination," wrote Chief Judge Hastie in *United States v. Bojardo*, 468 F.2d 112, 115 (3 Cir. 1969), followed in *Rainey v. United States*, 423 F.2d 628 (2 Cir. 1970). And see *United States v. Prevatt*, 414 F.2d 239 (5 Cir. 1969).

APPENDIX B

Opinion of the Court

(Filed 1-6-70)
No. 36451

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

JAMES ARMIENTO and EDWARD JERNEK,

Defendants.

TASKER, D.J.

This is a renewal of a motion to suppress. The original motion was denied by Judge Cooper on March 2, 1967. Since then the United States Supreme Court has ruled in Marchetti v. United States, 390 U.S. 39 (1968), that the occupational tax registration provisions of the Internal Revenue Act, 26 U.S.C. §§4411 and 4412, "may not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination." Id. at 42. Grosso v. United States, 390 U.S. 62 (1968), applied the reasoning of Marchetti to the gambling excise tax, 26 U.S.C. §4401, and the conspiracy law, 18 U.S.C. §371, insofar as the latter is applied to wagering

tax violations.

The defendants contend that, as a result of Marchetti and Grosso, evidence seized on the basis of two search warrants and an arrest warrant, which were in turn founded on affidavits substantially supported by information relating to violations of the wagering tax provisions, should be suppressed.[1] For the reasons set forth below the motion is denied.

The four-count indictment originally charged the defendants with (1) using a wire communication facility for the transmission in interstate commerce of bets and wagers in violation of Title 18 U.S.C. §§2 and 1084); (2) using a facility in interstate commerce to carry on a gambling enterprise in violation of Section 986 of the Penal Law of New York (Title 18, U.S.C. §§2 and 1952); (3) failing to pay the special tax imposed by Title 26, U.S.C. §4411; and (4) failure to supply the information required by Title 26, U.S.C. §4412.

Counts 3 and 4 have been dismissed with the consent of the Government because the defendants have properly asserted their Fifth Amendment defenses within the holdings of Marchetti and Grosso.

In view of the dismissal of counts 3 and 4, the only charges remaining against the defendants are those of using interstate facilities to violate New York and Federal anti-gambling and racketeering statutes.

The issue now raised, as distinct from the issue before Judge Cooper, which related solely

to the question of whether the underlying affidavits validly established probable cause for the issuance of the warrants, is whether evidence pertaining to gambling and racketeering should be suppressed on the ground that the supporting affidavits for the warrants permitting the searches consisted of information relating primarily to wagering tax violations.

The defendants claim, on the authority of Lee v. Kansas City, 390 U.S. 197 (1968), De Cesare v. United States, 390 U.S. 200 (1968); Piccioli v. United States, 390 U.S. 202 (1968), and Stone v. United States, 390 U.S. 204 (1968), that Marchetti and Grosso should be retroactively applied and that under the holding of Silbert v. United States, 289 F. Supp. 318 (D.C. Md. 1968), warrants issued on the basis of wagering tax violations cannot survive Marchetti and Grosso and cannot be used in an interstate gambling prosecution. Although in the light of Desist v. United States, 394 U.S. 244 (1969), and United States v. Bennett, decided by the Court of Appeals of this Circuit on September 9, 1969, Docket Nos. 32327-28 and 32336, defendants' position as to retroactive application of Marchetti and Grosso appears unfounded, I find it unnecessary to determine that question, since it is my view that the warrants in question remain valid even under the holdings of Marchetti and Grosso.

The defendants reason that under Marchetti and Grosso there is no longer any obligation for gamblers to register or to pay the wagering tax, and, therefore, that warrants based on information showing a failure to perform these acts are

legally insufficient, since no probable cause existed to believe that a crime would be committed. The Government, on the other hand, contends that the warrants in question are not affected by the holdings of Marchetti and Grosso because the sole purpose of the exclusionary rule under the Fourth Amendment — to deter improper conduct by law enforcement officers — is not applicable here, where the activity of the law enforcement officers was clearly proper, since the wagering tax provisions stood legally unimpaired at the time of the affidavits and search warrants. I add that, in my opinion, the affidavits and warrants still stand unimpaired, since the Supreme Court in Marchetti and Grosso ,did not hold the statutes as such unconstitutional. Precisely establishing the limits of its holding, the Court stated in Marchetti, at 61:

> "We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements."

Here, of course, the defendants will not be criminally punished for failure to comply with the requirements of the statute, the counts originally charging them with failure to comply having been dismissed. That the limited holding in Marchetti did not impair the validity of search warrants based on the wagering tax statute is further supported by the concurring opinion of Justices Stewart, Brennan and White in Stanley v. Georgia,

394 U.S. 557, at 570-1. There a warrant was issued by the Commissioner for the seizure of "equipment records and other material used in or derived from an illegal wagering business." As Mr. Justice Stewart stated, on the basis of such a warrant:

> "There can be no doubt, . . ., that the agents were lawfully present in the appellant's house, lawfully authorized to search for any and all of the items specified in the warrant, and lawfully empowered to seize any such items they might find."

Defendants cite for their position: United States v. $125,882 In U.S. Currency, 286 F. Supp. 643 (S.D.N.Y. 1968), and Silbert v. United States, supra. In United States v. Currency, Judge Tyler held that in the light of Marchetti and Grosso, the defendants could not constitutionally be punished by compelling forfeiture of money used in gambling operations. United States v. Currency is inapposite, however, since Judge Tyler based his ruling on the theory that "a forfeiture of property was deemed by the court to be an impermissible penalty to impose on the assertion of the Fifth Amendment privilege" (p. 645). Here, we have no penalty imposed for the assertion of the Fifth Amendment privilege. To the contrary, the defendants have asserted their Fifth Amendment privilege and, as indicated above, the counts based on the wagering tax statute have accordingly been dismissed with the consent of the Government and the approval of the court, and no further Fifth Amendment assertions with regard to the

remaining counts of the indictment have been made.

In Silbert, supra, the court concluded that, because the affidavits in question were "clearly underpinned and supported by the extensive allegations of federal wagering tax law violations," insufficient foundation for the alleged violations of the conspiracy and interstate racketeering laws existed in view of the fact that the affidavits' "underpinning and support has since been destroyed by Marchetti and Grosso," (p. 320). I find the reasoning of Silbert unpersuasive, and it is clear that the holding is a minority view, opposed to a substantial number of holdings to the contrary. The reasoning of Silbert has been refuted in Washington v. United States, 402 F.2d 3 (4th Cir. 1968),; United States v. Yeagle, 299 F. Supp. 257 (E.D. Ky. 1969), and State v. Gerardo, 53 N.J. 261, 250 A.2d 130 (1969). As the court stated in Washington, at 6:

> "The Supreme Court did not invalidate the wagering tax statutes; it did not abolish the criminal offenses therein specified; it did not say that an indictment or an information would not lie. The carefully circumscribed holding is that a defendant may not be convicted of a criminal violation of the wagering tax laws if he has properly claimed his constitutional privilege against self-incrimination. Under the circumstances, we conclude that where, as here, there exists probable cause for belief that an offense has been committed,[1] ... a valid search warrant may issue even though the Govern-

ment may be unable to convict the defendant if he properly raises his claim of privilege against self-incrimination." (Emphasis in original.)

Furthermore, as Judge Weintraub so effectively stated in State v. Gerardo, supra, at 133:

> "The Fourth Amendment does not call for the suppression of evidence obtained in violation of its provisions. The doctrine of suppression is judge-made, a device adopted upon the belief that there was no effective remedy for a violation of its terms. Suppression is ordered, not to rectify a wrong already done, but to deter future violations. So in Elkins v. United States, 364 U.S. 206, 217, 80 S. Ct. 1437, 1444, 4 L.Ed.2d 1669, 1677 (1960), the Court said:
>
> > * * * The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it. See Eleuteri v. Richman, 26 N.J. 506, 513, 141 A.2d 46, 50.'
>
> "The purpose, then, is to deter insolence in office. To that end, the suppression of the truth is tolerated even though the price will be paid, as we have said, by the defendant's next victim. But it would be a waste of the individual's first right, his right to be protected from crime, to set the offender

> free when there is no trace of official arrogance."

Here, it is clear that the conduct of the agents upon whose statements the affidavits were given and the warrants were issued was entirely proper and not tinged in any way with that insolence which the Fourth Amendment seeks to deter.

While the defendants themselves make no claim that Marchetti and Grosso raise a question of self-incrimination under the Fifth Amendment,3 the Government has treated the subject in its brief on this motion. I agree with the Government's view that the effect of the Marchetti and Grosso holdings is not such as to produce in this case a Fifth Amendment question as distinct from a Fourth Amendment question with regard to the suppressibility of the evidence seized under the warrants in question. See, for example, United States v. Boiardo, 408 F.2d 112 (3d Cir. 1969), and Rainey and Bowens v. United States, Docket No. 36064 (S.D.N.Y., July 31, 1969). As Judge McLean remarked in Rainey:

> "Testimony of the federal officers as to what they observed may incriminate plaintiffs, but it does not involve any self-incrimination on their part."

The motion to suppress is denied.

It is so ordered.

Dated: New York, N.Y.
January 6, 1969

s/ Morris E. Lasker
U.S.D.J.

Footnotes

1. The affidavit of Arthur Rubenstein, sworn to the 1st day of June, 1966, supporting the warrant for the search of Apartment 6C, 110 East 36th Street, New York, New York, is typical of the affidavits and complaints in issue here. The complaints and affidavits are substantially identical in their assertions.

> "BEFORE EARLE N. BISHOPP, United States Courthouse, New York, N.Y. 10007
>
> "The undersigned being duly sworn deposes and says:
>
> "That he has reason to believe that on the premises known as Apartment 6C, 110 East 36th Street, New York, New York, in the Southern District of New York, there is now being concealed certain property, namely gambling and wagering paraphernalia, including but not limited to bet slips, records of wagering business, other books and papers used in the conduct of the wagering business, telephones and money, which are being used as instrumentalities in the commission of a violation of Title 26, United States Code, Sections 4401, 4411, 7262,
>
> "And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:
>
> "1. Investigations made in the course of affiant's official duties reveal the following facts:

Footnotes

"a. Statements personally made to deponent in the course of his official duties by Special Agents of the Intelligence Division, Internal Revenue Service, United States Treasury Department, that said Special Agents, while acting in an undercover capacity, personally placed wagers with JOHN DOE, a/k/a 'Jimmy' and 'Mr. Peters', meaning thereby to describe a white male, approximately 45 years old, with black hair and greying temples, weighing approximately 185 pounds and about 5'11" tall in person or by phone on at least ten occasions between April 1, 1966 and May 31, 1966.

"b. A search of the official records of the Internal Revenue Service in both the Manhattan and Brooklyn District offices fails to reveal any record of any person having paid the wagering tax imposed by Title 26 United States Code, Section 4411, who uses the names or aliases of said John Doe, or meeting the description of said John Doe and accepting wagers in the locations used by said John Doe.

"c. Surveillance of said John Doe entering Apartment 6C, 110 East 36th Street on two separate occasions between May 10, 1966 and May 26, 1966. On each occasion, said John Doe entered said apartment 6C between 10:00 a.m. and 10:20 a.m. On May 10, 1966, said John Doe entered Apartment 6C at approxi-

Footnotes

mately 10:15 a.m. carrying a brown paper bag believed to contain wagering paraphernalia. At approximately 10:35 a.m. said John Doe exited 110 East 36th Street without the brown paper bag. On another occasion, said John Doe was observed entering the building known as 110 East 36th Street carrying a brown paper bag at approximately 10:20 a.m. At approximately 10:55 a.m. said John Doe exited said 110 East 36th Street and at 11:05 a.m. said John Doe entered the building known as 150 East 35th Street.

"On four occasions, said John Doe was observed exiting 110 East 36th Street and observed on two occasions entering apartment actually marked 71, but meaning apartment 710 on the seventh floor of 150 East 35th Street.

"On May 13, 1966, said John Doe was observed entering Apartment 6C, 110 East 36th Street at approximately 10:02 a.m. An undercover agent observed the door of Apartment 6C from 10:02 a.m. and 10:50 a.m. No one exited the apartment during that time. During this same period, another undercover agent placed a bet with said John Doe by telephone. The undercover agent outside the door of Apartment 6C heard the telephone ringing in said apartment while said John Doe was therein and the telephone being answered.

Footnotes

"On several occasions, the last of which was on May 26, 1966, after said John Doe was observed entering Apartment 710, on the seventh floor of 150 East 35th Street, an undercover agent maintained surveillance of said apartment. At the same time another undercover agent placed a bet with said John Doe by telephone. During this period, said John Doe did not leave apartment 710, 150 East 35th Street. The undercover agent while outside the door of apartment 710 heard a telephone ringing and being answered.

"d. The records of the New York Telephone Company revealed that non-published telephone number OR 9-1674 is registered to J. Jiranek, Apartment 6C, 110 East 36th Street.

/s/ Arthur Rubenstein

"Sworn to before me, and
subscribed in my presence,
this 1st day of June 1966.

/s/ Earle N. Bishopp

U.S. COMMISSIONER
SOUTHERN DISTRICT OF NEW YORK"

2. In Washington v. United States, supra, defendants conceded that probable cause existed at the time the warrant was issued. In this case defendants have not made such a con-

cession, but Judge Cooper's decision of March 2, 1967 so held and I find no reason to decide differently.

The defendants here have not claimed that the supporting affidavits are insufficient under the holding of Spinelli v. United States, 393 U.S. 410 (1968), and it is clear that they are not. The defects of the affidavit in that case are absent here. The leads in the instant case were provided by special undercover agents and not by an informer. Most importantly, the affidavits were based on reports from the special agents of personal observations of the defendants and of transactions personally carried out between the agents and the defendants. Surveillance here was accompanied by telephone calls personally placed by the agents. The affidavits referred to material derived from ten different incidents. Finally, the affiants examined the Internal Revenue Service files and personally discovered that defendants had failed to register, an element of one of the crimes which was the subject of the investigation. In Spinelli, in contrast, most of the affidavit reported peripheral issues and "innocent-seeming activity" (393 U.S. at 414), such as seeing defendants in various cars or entering various buildings, and the affidavit was based merely on statements from "reliable informants" whose reliability was not established within the affidavit itself. In addition, it should be noted that the affidavits here are not restricted to information relating to violations of the wagering tax statutes.

Footnotes

3. The Court in Silbert, supra, had reasoned that subjecting a gambler to being searched if he failed to comply with the registration requirement itself was coercion, and thus a violation of the gambler's Fifth Amendment rights.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-72

EDWARD JERNEK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court of the Southern District of New York, petitioner and James Armiento were convicted of using the telephone to transmit bets in interstate commerce in violation of 18 U.S.C. 1084 and of using interstate facilities to promote an illegal gambling enterprise in violation of 18 U.S.C. 1952. The court of appeals affirmed (Pet. App. 1a–9a).

Some of the evidence used to convict the petitioner was obtained under search warrants charging violations of the wagering tax statutes (26 U.S.C. 4411 and 4412). These warrants were issued and the evidence was obtained in 1966 prior to *Marchetti* v.

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